PAUL M. McCONKIE (USB #5881)
CHRISTIAN C. STEPHENS (USB #9068)
Assistant Attorneys General
MARK L. SHURTLEFF (USB #4666)
UTAH ATTORNEY GENERAL
160 East 300 South
P.O. Box 140873
Salt Lake City, UT 84114-0873
Telephone: (801) 366-0290
Facsimile: (801) 366-0292
Attorneys for the Executive Secretary of the Utah Air Quality Board

BEFORE THE UTAH AIR QUALITY BOARD

In the Matter of: Unit 3, Intermountain Power Service Corporation, Millard County, Utah DAQE-AN0327010-04	EXECUTIVE SECRETARY'S MEMORANDUM IN OPPOSITION TO SIERRA CLUB'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 7(c)(1) of the Utah Rules of Civil Procedure, the Executive Secretary of the Utah Air Quality Board ("Executive Secretary") submits this Memorandum in Opposition to Sierra Club's Motion for Summary Judgment dated February 26, 2007. As Sierra Club's motion is premature and the material facts in Sierra Club's motion are disputed, Sierra Club is not entitled to judgment as a matter of law, and the Executive Secretary respectfully submits that the Air Quality Board should deny Sierra Club's Motion for Summary Judgment.

I. INTRODUCTION

On October 15, 2004, the Executive Secretary issued an Approval Order to Intermountain Power Service Company (IPSC) to construct and operate an additional unit at the Intermountain Power Plant in Millard County, Utah. On November 16, 2004, Sierra Club filed a Request for Agency Action ("RFA") to contest the Approval Order. The Executive Secretary anticipates that the Board will hold a hearing on the merits in November 2007. Sierra Club now moves for

summary judgment on the new claim which is the subject of its pending motion to amend, as well as on two claims previously added to its RFA.[1] The Executive Secretary has already filed an opposition to the motion to amend which is now pending before the Board. Sierra Club's Motion for Summary Judgment should be denied because (1) Sierra Club erroneously relies on an inapplicable federal regulation; and (2) Sierra Club's statement of material facts is controverted such that Sierra Club cannot prevail as a matter of law.

Standard of Review

According to Utah Rule of Civil Procedure 56(c), summary judgment should be granted only when it is clear from undisputed facts, viewing evidence in light most favorable to the nonmoving party, that the opposing party cannot prevail. Warren v. Provo City Corp., 838 P.2d 1125, 1128 (Utah 1992); Lach v. Deseret Bank, 746 P.2d 802, 804 (Utah Ct. App. 1987). If there is any dispute as to any issue material to settlement of the controversy, summary judgment should not be granted. Holbrook Co. v. Adams, 542 P.2d 191, 193 (Utah 1975).

Although Sierra Club correctly cites the summary judgment standard under Rule 56, Sierra Club's additional argument that the appellate review standards set forth in Utah Code Ann. § 63-46b-16(4), apply to the Board's review of the Executive Secretary's action is misplaced. The standards in § 63-46b-16(4) only apply to the Utah Court of Appeals when it reviews the Board's decisions. Since Sierra Club seeks not judicial review in an appellate court, but rather contests an "initial order" of the Executive Secretary pursuant to Utah Admin. Code R307-103-3(1) and Utah Code § 63-46b-3(3), said standards do not apply. Rather, in this proceeding the Board sits as an adjudicative body similar to a trial court, evaluating evidence, determining the

[1]On November 15, 2006, Sierra Club amended its Request for Agency Action, adding two new claims.

facts from evidence and witness testimony, and making conclusions of law,[2] with the burden of proof being a preponderance of the evidence.[3]

II. ARGUMENT

A. Sierra Club's Reliance on the Federal Regulation is Misplaced

Sierra Club's proposed new claim (No. 22) alleges that "twenty eight months have passed since the Executive Secretary signed the Approval Order for the proposed plant," and that "the AO is now invalid, having expired automatically on or about April 15, 2006." *See* Sierra Club proposed Second Amended Request for Agency Action at 20-22. In support of summary judgment on this claim, Sierra Club argues that as a matter of law, the Approval Order automatically expired 18 months after issuance. This is a faulty presumption based on a federal regulation that does not apply to this Approval Order. The federal regulation relied upon by Sierra Club, 40 C.F.R. § 52.21(r)(2), states in pertinent part that "[a]pproval to construct shall become invalid if construction is not commenced within 18 months of receipt of such approval . . . ." This regulation was not incorporated into Utah Admin. Code R307-405-19(1) until the

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[2]*See* Utah Code Ann. § 63-46b-8, which governs the procedures for formal adjudicative proceedings. Because Sierra Club has filed a Request for Agency Action to contest an Initial Order of the Executive Secretary, this case is a formal adjudicative proceeding. *See also* § 63-46b-3 (commencement of adjudicative proceedings); Utah Admin. Code R307-103-4 ("[c]ontest of an initial order . . . shall be conducted as a formal proceeding"). By contrast, judicial review by the Court of Appeals or the Supreme Court employs different standards, as outlined in § 63-46b-16. It hardly seems plausible that the Legislature would provide one set of standards to govern adjudicative proceedings before the Air Quality Board and another to govern judicial review by the Court of Appeals if the Legislature intended both to apply the same standards. The bright line between these two standards is not blurred simply because these proceedings are adjudicative in nature.

[3] Walker v. Bd. of Pardons, 803 P.2d 1241 (Utah 1990) (stating that in administrative proceedings, the burden of proof is a preponderance of the evidence).

March 2006 Air Quality Board meeting, to become effective in June 2006.[4] Because this federal regulation was not part of the rules at the time the Executive Secretary issued the Approval Order, the Approval Order is not subject to that regulation.

On the other hand, Condition 8 of the Approval Order and Utah Admin. Code R307-401-18 govern this question, and both endow the Executive Secretary with broad discretion to revoke the Approval Order if construction has not commenced after 18 months.[5] Neither of these provisions mandate an automatic expiration of the approval order.

Consequently, Sierra Club's legal arguments based upon this federal regulation are without merit.

B. The Executive Secretary Disputes Sierra Club's Statement of Undisputed Facts

Rule 7(c)(3)(B) of the Utah Rules of Civil Procedure requires that an opposition memorandum "contain a verbatim restatement of each of the moving party's facts that is controverted" and for each controverted fact, "provide an explanation of the grounds for any dispute . . . ."

In support of its Statement of Facts, Sierra Club attempts to rely upon the preliminary administrative record distributed on February 15, 2007, to show that certain actions did not occur. Because the record is only as broad as the allegations to date in Sierra Club's Request for

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[4]*See* Exhibit A. This exhibit contains the amendments proposed to the Utah Air Quality Board at the March 2006 Air Quality Board meeting. It includes both the original rules and the proposed amendments that were ultimately adopted by the Board.

[5]Utah Admin Code R307-401-18 states that "[a]pproval orders issued by the Executive Secretary in accordance with the provisions of R307-401 will be reviewed 18 months after the date of issuance to determine the status of construction, installation, modification, relocation, or establishment. If a continuous plan of construction, installation, modification, relocation or establishment is not proceeding, the Executive Secretary may revoke the approval order."

Agency Action, there would be no reasonable expectation that the administrative record would contain any documentation concerning a post-permit 18 month review. Consequently, Sierra Club's reliance upon the preliminary administrative record to show what the Executive Secretary may or may not have done in his R307-401-18 review is misplaced.

1. The Executive Secretary Disputes Sierra Club's Fact No. 3 (related to Statement of Reason #22)

The Executive Secretary disputes Sierra Club's Fact No. 3 which states "Eighteen months after the date of the AO - on or about April 15, 2006 - IPSC did not submit the required notification of the status of construction."

The Executive Secretary disputes that "IPSC did not submit the required notification of the status of construction." A review of the relevant time line demonstrates that IPSC submitted notification of the status of the construction. On January 13, 2006, IPSC sent a letter to the Executive Secretary explaining the current status of the IPSC project. *See* IPSC letter to Executive Secretary attached hereto as Exhibit B. In that letter, IPSC outlined its belief that its permit conditions were valid and requested an extension of the 18 month period. This letter provided the Executive Secretary with information regarding the "status of construction, installation, modification, relocation, or establishment" of the IPSC project, and the Executive Secretary elected to not revoke the Approval Order.[6] Whether IPSC submitted the "required" notification is a question of law which the Board would determine by applying the law to the facts. Because Sierra Club has misstated the underlying facts, a genuine issue of material fact still exists, such that Sierra Club is not entitled summary judgment.

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[6]*See* Executive Secretary's letter to IPSC attached hereto as Exhibit C.

2. The Executive Secretary Disputes Sierra Club's Fact No. 4 (related to Statement of Reason #22)

Sierra Club's Fact No. 4 states "Eighteen months after the date of the AO – on or about April 15, 2006 – the Executive Secretary made no determination regarding a revocation of the AO, nor whether an extension of the AO was justified."

Again, Sierra Club misstates the facts by relying on a preliminary administrative record which would not be expected to contain information on an 18 month review. *See* section B.1. above. Because a genuine issue of material fact exists on this question, Sierra Club cannot prevail as a matter of law and is not entitled to summary judgment.

3. The Executive Secretary Disputes Sierra Club's Fact No. 13 (related to Statements of Reasons #20 and #21).

The Executive Secretary disputes Sierra Club's Fact No. 13 which states that "[o]n August 17, 2006, DAQ responded that if [sic] found 'in accordance with Condition 7 of the Approval Order number DAQE-AN0327010-04, a supercritical PC Boiler is equivalent to the permitted unit,' thereby approving the modification IPSC requested. DAQ did not approve any other changes to the AO."

Sierra Club wrongly labels the Executive Secretary's August 17, 2006 decision to allow IPSC to substitute a supercritical PC boiler for the subcritical PC boiler as a modification of the approval order. "Modification" is defined in Utah Admin. Code R307-101-2 as "any planned change in a source which results in a potential increase in emission." Because use of a supercritical PC Boiler will not cause a process unit change that would increase emissions, there was no modification of the Approval Order. Nor would the substitution qualify as a new source. Because R307-401 by its terms applies only to new sources or modifications that will "increase

the amount of contaminants discharged . . . ." Utah Admin. Code R307-401-3(1), the remaining provisions of R307-401 do not apply. IPP Unit 3 is neither a "new installation" or a "modified installation that will increase the amount of air contaminants discharged." Sierra Club's statement of facts mischaracterizes the Executive Secretary's action and how the law would apply to that action.

Because the Approval Order does not specify the type of boiler that IPSC must use, but rather the emissions limitations that the facility must meet, new modeling and analyses were not required. To be sure, Condition 7 of IPSC's Approval Order specifically allows for equivalency determinations. In making an equivalency determination under Condition 7, the Executive Secretary regulates air pollution, not electricity production. Thus, the relative efficiency of the selected process is not the Executive Secretary's call so long as there is no process unit change that would increase emissions. Therefore, Sierra Club's contention that the two boilers are not equivalent because one may produce more megawatts than the other is an irrelevant distinction. If the substituted process unit does not result in any greater emissions, the two are equivalent for purposes of the Approval Order conditions and the governing law.

Further, the Executive Secretary's decision to allow the substitution satisfies the in-kind replacement provision in Utah Admin Code R307-401-11, which specifically exempts a source from the Notice of Intent requirements of R307-401 when regulatory criteria for replacement in kind are met.

4. The Executive Secretary Disputes Sierra Club's Fact No. 14 (related to Statements of Reasons #20 and #21).

The Executive Secretary disputes Sierra Club's Fact No. 14 which states that

"[t]he Administrative Record contains no analysis to support the Executive Secretary's determination."

This statement of fact by Sierra Club is without basis. Utah Admin. Code R307-401-11(2)(a) requires that the source, before replacing equipment, submit written notification containing a description of the replacement in-kind equipment, including the control capability of any control apparatus and a demonstration that the conditions of R307-401-11(1) are met. The regulation further provides that if the source's submission meets the criteria required by the regulation, the Executive Secretary will update the source's approval order, and "public review under R307-401-7 is not required." Utah Admin. Code R307-401-11(2)(b).

In its request to substitute the supercritical PC boiler, IPSC submitted materials to the Executive Secretary.[7] Based upon the submitted materials and the Division of Air Quality's experience and review of supercritical boilers for the original issuance of the Approval Order, the Executive Secretary agreed that the supercritical PC boiler would be equivalent to the subcritical PC boiler and allowed the substitution. *See* Executive Secretary's letter to IPSC re: Equivalency attached hereto as Exhibit E. The IPSC submissions as well as the Executive Secretary's response thereto are contained in the Administrative Record.

Based on the foregoing, this material fact presented by Sierra Club is disputed. Therefore, Sierra Club is not entitled to summary judgment.

5. <u>The Executive Secretary Disputes Sierra Club's Fact No. 15 (related to Statements of Reasons #20 and #21).</u>

The Executive Secretary disputes Sierra Club's Fact No. 15 which states that "[t]here was

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[7] *See* Exhibit D, attached.

no notice to the public of the proposed modification of the AO, and no opportunity for public comment, before the Executive Secretary approved the modification of the AO."

As outlined above, the public notice requirements set forth in Utah Admin. Code R307-401 only apply to new sources or modification that result in an increase in the amounts of contaminants discharged. As neither occurred in this case, the public notice and opportunity for comment provisions therein were not required.

Because there exists a genuine issue of material fact, Sierra Club is not entitled to judgment as a matter of law.

C. Sierra Club's Motion for Summary Judgment is Premature

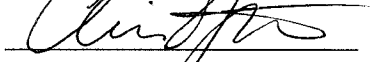
Sierra Club's Motion for Summary Judgment is premature because it is based upon a new claim that is the subject to a pending motion to amend. In the interest of expediency, however, the Executive Secretary responds to the merits of Sierra Club's motion so that it can be heard and resolved at the April board meeting.

CONCLUSION

Based upon the foregoing, Sierra Club is not entitled to summary judgment, and its motion should therefore be denied.

Dated this 19th day of March, 2007.

MARK L. SHURTLEFF
Utah Attorney General



PAUL M. McCONKIE
CHRISTIAN C. STEPHENS
Assistant Attorneys General

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of March, 2007, a true and correct copy of the foregoing Executive Secretary's Motion for Partial Judgment on the Pleadings was mailed, postage prepaid, and/or emailed to the following:

Joro Walker

David Becker
Western Resource Advocates

425 East 100 South
Salt Lake City, UT 84111

jwalker@westernresources.org
dbecker@westernresources.org

Martin K. Banks

Stoel Rives
201 S. Main, Suite 1100

Salt Lake City, UT 84111
mkbanks@stoel.com

Michael G. Jenkins

Assistant General Counsel
PacifiCorp

201 S. Main, Suite 2200
Salt Lake City, UT 84111
michael.jenkins@pacificorp.com

Fred G Nelson

Assistant Attorney General
160 East 300 South, 5th Floor

Salt Lake City, UT 84114
fnelson@utah.gov

Fred Finlinson

Finlinson & Finlinson
11955 Lehi-Fairfield Rd.

Saratoga Springs, UT 84043
f2fwcrf@msn.com

E. Blaine Rawson
Holme, Roberts & Owen
111 East Broadway, #1100
Salt Lake City, UT 84111
rawsonb@hro.com

Brian Burnett

Callister & Nebeker
10 West South Temple, Suite 900

Salt Lake City, UT 84114
brianburnett@cnmlaw.com

PAUL M. McCONKIE
CHRISTIAN C. STEPHENS
Assistant Attorneys General